

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

APOLLO HEALTH, INC.

and

Case 13-CA-189486

ONDREA SNYNER, an Individual

Lisa Friedheim-Weis, Esq., for the General Counsel.

Frederick E. Bernardo, Esq. (Jurisprudence Health Law Group, Naperville, Illinois)
for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Chicago, Illinois on June 7, 2017. Ondrea Snyder filed the initial charge in this matter on December 7, 2016. The General Counsel issued a complaint on February 27, 2017 and then an Order consolidating the unfair labor practice case and compliance specification on May 17, 2017.

The General Counsel alleges that Respondent discharged Ondrea Snyder in retaliation for protected concerted activity. He also alleges that the net backpay and interim expenses owed to Ms. Snyder as the result of this discharge is \$43,530.00. The General Counsel also alleges that she is due \$70 for excess tax liability for a total of \$43,600.

Additionally, the General Counsel alleges that Respondent violated the Act by prohibiting employees from forwarding emails to coworkers regarding Respondent's standards for productivity, maintaining a covenant of non-disclosure, which prohibited employees from disclosing confidential information, defined in part as compensation data, educational and training materials, employee data or lists, and labor relations strategies and maintaining a covenant of non-disparagement.¹

¹ I denied the General Counsel's motion to amend the complaint alleging that Respondent violated the Act in its subpoena to the Charging Party.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, operated a home health care business in Chicago, Illinois from 2013 until March 2017, when it ceased operations. During calendar year 2016, Respondent derived gross revenue in excess of \$100,000. During 2016, Respondent performed services valued in excess of \$5,000 in states other than Illinois. Respondent admits, and I find, that it is, or was at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

On February 19, 2016, the Charging Party, Ondrea Snyder, RN, an Advanced Practical Nurse (APN),² signed an employment contract with Respondent. She was hired at a salary of \$90,000 per year. The employment contract contained a covenant of nondisclosure by which the employee agreed not to divulge, among other things, compensation data, educational and training materials, employee data or lists and labor relations strategies, G.C. Exh. 2, pg. 3.

The contract also contained a covenant of non-disparagement which prohibited employees from making any statements calculated to have the effect of undermining or disparaging Respondent. It stated that employees may give truthful and non-malicious testimony if lawfully compelled to do so by legal process, G.C. Exh. 2 pg. 4.

Ms. Snyder's tasks consisted of visiting and treating home bound patients, all, or many of whom are insured by Medicare. Snyder's APN license lapsed for 2 or 3 days in June 2016 because payment for the license was late. Respondent did not discipline her or chastise her for this lapse.

On July 1, 2016, Snyder called Brian Weinstein, the CEO and owner of Apollo. She complained that some patients would not see her, some because they wanted to be seen by the same provider who they saw previously and some because they were accusing Respondent of Medicare fraud. Weinstein became angry at Snyder and told her that she had to see the patients she was told to see.

² APN is a more advanced category than RN.

Weinstein testified that he wrote and placed a disciplinary memo in Snyder's personnel file on July 1. However, he never told Snyder that he did so. On July 2, he sent her a conciliatory text message, "We will talk more Tuesday. I see your side of the matter. Have a good weekend," G.C. Exh. 10.

On July 15, Snyder met with Linelle Allred, a consultant hired by Respondent, and Keeshia Eguia, Respondent's office manager. Snyder presented them with a list of complaints (or suggestions) regarding how Respondent was operating.

Between August 9 and August 26, 2016, Snyder's Medicare certification lapsed. I need not determine the conflicting testimony as to who was at fault. Weinstein testified that placed another disciplinary memo in Snyder's file as a result, but he never gave her a copy or told her that she was being disciplined.

Snyder and Weinstein had a telephone conversation on August 19, in which they argued about whether she should be paid for certain days. Weinstein agreed to pay her for August 19, but not for several other days. Respondent also locked Snyder out of its email system on August 19. Snyder discussed this with an attorney representing Apollo and she was put back into the system.

On October 4, 2016, Weinstein sent Snyder an email, G.C. Exh. - 3:

We have started to track productivity on a daily basis and I am sending you your screen shot of the month of September.

This is based on our base of productivity of 10 visits a day. Your percentage average to 69.5%

You had 4 days at 50%. We need to eliminate these days as it drags your average down.

Our goal for October is to hit 80-85% average. I need you to continue to work with Vanessa³ to find add on when appropriate. We can not operate at 69% all of the time all year long. We need to have average in the 80% range in order to generate enough revenue to keep everyone going.

Snyder responded:

In response to productivity this is the first mention or notification of this monitoring or screen shot since my hire. Productivity monitoring was not even addressed at the most recent provider meeting in last month. How is this productivity monitoring configuration achieved and does it account for the high patient cancellation rates at Apollo. I have email or texted you, Keesha and Vanessa on almost daily basis regarding issues that affect productivity.

³ Vanessa was Respondent's route manager in October 2016.

Many of my patients are not confirmed by the scheduler so myself and many of the other providers continue to experience high patient cancellations daily/weekly. I have documented this to the office almost daily. It is always my goal to see as many patients as possible, but if patients are put on the schedule but not confirmed and I continue to having almost 50% cancellation daily through no fault of my own. It is impossible to meet said productivity goal.

Scheduling and high cancellations rates have been problem for Apollo since my hire and I have documented these factors with the Apollo office frequently (almost via email or text). Additionally, I have notified the route manager that there have been days when we did not even have gas or finances to purchase gas so we would have been able to see all the assigned patients. Gas/Vehicle Scheduling issues continue to profoundly affect myself and all other providers' productivity at Apollo. How can productivity even be addressed if the providers do not know how the productivity is measure/achieved and the aforementioned issues have not been remedied so that providers can achieve good productivity at Apollo.

I am forwarding this to the other providers at Apollo to see what there thoughts are on this matter of Productivity at Apollo.

Weinstein responded to Snyder on October 6, at 5:15 a.m. as follows:

I have already shared the other providers productivity. It would be inappropriate to forward any emails to the rest of the providers. We all need to be productive so do not email other providers.

We are simply starting to track it. I understand that there are cancellations. That is why we have Vanessa look for add Ons.

The gas issue to my knowledge only happened this week one time.⁴

After receiving Weinstein's 5:15 a.m. email, Snyder sent a text to other Apollo providers and Keeshia Eguia, Respondent's office manager, at 9:05 a.m the same morning:

Good morning group I just want to place a question out there about productivity does anybody know how it's being measured and additionally we're having high patient cancellation of rates because scheduling is not confirmed or there's issues with scheduling is anybody else have the same concerns please let me know.

Other providers responded to this text. One stated that he or she had 5 cancellations on the previous day. Prema David, another APN, texted: "Do not worry. They are talking garbage with Vanessa. I will call you." Alberta Reynolds responded with a text stating that she had the same issue the previous day with four cancellations.

⁴ This email is alleged to have violated Section 8(a)(1) in paragraph IV (a) of the complaint.

To establish an 8(a)(1) violation based on an adverse employment action where the motive for the action is disputed, the General Counsel has the initial burden of showing that protected activity was a motivating factor for the action, *Wright Line*, 251 NLRB 1083 (1980). The General Counsel satisfies that burden by proving the existence of protected activity, the employer's knowledge of the activity, and animus against the activity. If the General Counsel meets his burden, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Where the adverse action is taken in response to protected activity, the Board applies the analysis set for the in *Atlantic Steel Co.*, 245 NLRB 814 (1979). In making this determination the Board balances four factors: 1) the place of discussion; 2) the subject matter of the discussion; 3) the nature of the employee's outburst and 4) whether the outburst was provoked by an employer's unfair labor practice; Also see *Overnite Transportation Co.*, 343 NLRB 1431, 1437 (2004) .

I find that the General Counsel has established that Respondent violated the Act in discharging Ondrea Snyder under either standard. However, if forced to choose, I would conclude that *Atlantic Steel* is the more appropriate analytical vehicle in this case. Whether Ms. Snyder's text message was "the straw that broke the camel's back or the bullet between the eyes," her discharge is enough to come with the proscription of the Act. Her text was casually related to her discharge, *Wright Line*, *supra*, at 1089 fn. 14; *Bronco Wine Co.*, 256 NLRB 53, 54 FN. 8 (1981). It is clear she would not have been discharged on October 10 but for her protected text message. It is also clear that there is nothing about her protected conduct that would have forfeited the protections of the Act.

Respondent's October 6, 2016 email violated Section 8(a)(1)

Employees have a right to discuss with other employees the terms and conditions of their employment, including such matters as productivity standards. A rule, or statement by an employer restricting this right violates Section 8(a)(1) absent a sufficient business justification, *Cintas Corp.*, 344 NLRB 943, 946 (2005) *enfd.* 482 F.3d 463 (D.C. Cir. 2007). It makes no difference whether employees are merely asked, or ordered not to discuss the terms and conditions of their employment. Either way such a statement or rule violates the Act, *Franklin Iron and Metal Corp.*, 315 NLRB 819, 820 (1994). Respondent's October 6, 2016 email to Snyder, advising her that it would be inappropriate for her to forward emails regarding Respondent's productivity standards to other employees, and instructing her not to do so, violated the NLRA. Respondent has not established any sufficient business justification for this statement or rule.

Respondent's Covenant of Non-Disclosure

Respondent's employment contract contained a covenant of nondisclosure by which the employee agreed not to divulge, among other things, compensation data, educational and training materials, employee data or lists and labor relations strategies. This violates the Act because in requiring employees not to divulge compensation data, it could be reasonably construed to prohibit discussion of wages and other terms and conditions of employment with their coworkers and third parties, *MCPC, Inc.*, 360 NLRB 216 (2014).

Respondent's Covenant of Non-Disparagement

A rule prohibiting disparaging an employer, such as that in Respondent's Covenant of Non-Disparagement, violates Section 8(a)(1) because it would reasonably be construed to prohibit expression of concerns over working conditions, *William Beaumont Hospital*, 363 NLRB No. 162 (2016); *Southern Maryland, Hospital*, 293 NLRB 1209, 1222 (1989).

Compliance Specification

The finding of an unfair labor practice is presumptive proof that some backpay is owed. The sole burden of the General Counsel is to show the gross amount of backpay due, i.e., what the employee would have received but for the employer's illegal conduct. Once that has been established the burden is on the employer to establish facts that would mitigate that liability, *Food and Commercial Workers Local 1357*, 301 NLRB 617, 619 (1991). Respondent has failed to do so.

Specifically, I conclude that Respondent failed to sustain its burden of showing that Ondrea Snyder failed to make diligent effort to find suitable employment. Snyder was required to make a good faith effort to find employment. Snyder testified that she went to job fairs and spent 100 hours seeking employment, Tr. 76. Respondent did not meet its obligation to satisfy its affirmative defense that Snyder unjustifiably refused to take desirable new employment, *Id.* Brian Weinstein testified that APNs are much in demand. However, the existence of job opportunities does not compel an inference that Snyder would have been hired, *Lundy Packing Co.*, 286 NLRB 141, 142 (1987). As she surmised, prospective employers may well have shied away from hiring her in light of the fact that she had been discharged by Respondent.

In conclusion, I find that Respondent owes Ondrea Snyder \$43,600 as testified to by compliance officer Christina Ortega. The amount consists of \$1,730.77 per week from October 10, 2016 until March 20, 1977 (\$39,809), the income she would have received pursuant to her employment contract if she had not been terminated. It also includes out of pocket expenses of \$100 for her job search, \$731 for maintaining her professional license, \$2,890 for out-of-pocket medical expenses and \$70 for her excess tax liability.

REMEDY

The Respondent, having discriminatorily discharged an employee, must make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No.8 (2010). Respondent shall compensate her for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings, computed as described above and as set forth in the compliance specification.⁵

⁵ Respondent may also be liable for additional interest which may have accrued or will accrue.

Respondent shall reimburse the discriminatee in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Thus, Respondent shall compensate Ondrea Snyder in the amount of \$43,600, as calculated by the compliance officer. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits the discriminatee's backpay to the proper quarters on her Social Security earnings record.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

Respondent, Apollo Health, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any of its employees for engaging in and/or planning to engage in protected concerted activities, such as texting their coworkers to enlist their support regarding wages, hours or other terms and conditions of employment.

(b) Maintaining a Covenant of Non-Disclosure, prohibiting employees from disclosing confidential information, defined in part as compensation data, educational and training materials, employee data or lists, and labor relations strategies.

(c) Maintaining a Covenant of Non-Disparagement that prohibits employees from making any statements calculated to have the effect of undermining or disparaging Respondent.

(d) Interfering with employees' rights to communicate with other employees and/or third parties regarding the terms and conditions of their employment.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Ondrea Snyder whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision. Respondent shall compensate her for her search-for-work and interim employment

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

expenses regardless of whether those expenses exceed her interim earnings, as set forth in the remedy section.

(b) Compensate Ondrea Snyder for the adverse tax consequences in the amount of \$70 due to receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(c) Compensate Ondrea Snyder in the amount of \$43,600 as calculated by the compliance officer.

(d) Revise or Rescind the violative portions of the Non-Disclosure and Non-Disparagement Covenants in its employment contracts.


(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify Ondrea Snyder in writing that this has been done and that the discharge will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 6, 2016.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 26, 2017



Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in or planning to engage in protected concerted activity, such as texting your co-workers to enlist their support regarding wages, hours or other terms and conditions of employment.

WE WILL NOT restrict your right to communicate with your co-workers or third parties in enlisting the support of others in matters regarding wages, hours or other terms and conditions of employment.

WE WILL NOT maintain a Covenant of Non-Disclosure, prohibiting employees from disclosing confidential information, defined in part as compensation data, educational and training materials, employee data or lists, and labor relations strategies.

WE WILL NOT maintain a Covenant that prohibits you from disparaging this company or its officials.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Ondrea Snyder whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Ondrea Snyder for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings, computed as described above.

WE WILL compensate Ondrea Snyder for the adverse tax consequences, in the amount of \$70, due to receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL compensate Ondrea Snyder in the amount of \$43,600 as calculated by the compliance officer.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Ondrea Snyder, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

APOLLO HEALTH, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Dirksen Federal Building, 219 South Dearborn Street, Suite 808, Chicago, IL 60604-1443
(312) 353-9158, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-189486 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170.